NO. 255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

GERHART EISLER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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OPINIONS BELOW

The majority (R. 233-240) and dissenting (R. 241-245) opinions in the Court of Appeals have not yet been reported. The opinions of the district court striking the affidavit of prejudice (R. 4-6) and denying motions for a new trial and in arrest of judgment (R. 205-208) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 14, 1948 (R. 246). The order denying a petition for rehearing was entered July 17, 1948 (R. 250). On August 31, 1948, within the time as extended by Mr. Chief Justice Vinson (R. 252), the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (now 28 U. S. C. 1254(1)). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the affidavit of bias and prejudice which was filed against the trial judge was legally sufficient to disqualify him.

2. Whether the court's conduct of the trial was fair.

3. Whether petitioner, who refused to be sworn and to testify before the House Committee on Un-American Activities except upon condition that he be allowed to make a preliminary statement, has standing to challenge the constitutionality of the Committee's authority; and, if so, whether the House Resolution which authorized the committee and empowered it to compel testimony is constitutional.

4. Whether, in a prosecution of the petitioner for willful default, the evidence was sufficient to support the allegation in the indictment that peti-

tioner was summoned to give testimony upon a matter under inquiry by the Committee.

5. Whether a witness in a congressional inquiry can insist that he be allowed to state objections to his appearance in advance of taking oath and testifying.

6. Whether a "willful default" within the meaning of R. S. 102 (2 U. S. C. 192) requires an evil or bad purpose in addition to deliberate and intentional conduct.

7. Whether, as an alien enemy in the custody of immigration officials, petitioner was exempt from the duty to testify in a legislative inquiry.

STATUTES AND RESOLUTION INVOLVED

Section 21 of the Judicial Code (28 U. S. C. [1946 ed.], 25)[1] provided, as of the time involved herein, as follows:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27

[1] Now 28 U. S. C. 144. Except for minor changes in arrangement and phraseology the new section is identical.

of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself ~~unable~~ for any reason to preside with absolute impartiality in the pending suit or action.

R. S. 102, as amended (2 U. S. C. 192) provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

House of Representatives Rule XI(q) (2), as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, 828, and thereafter adopted by the House of Representatives (H. Res. No. 5, 80th Cong., 1st Sess.), provides:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such

testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

On February 27, 1947, petitioner was indicted in the United States District Court for the District of Columbia for a violation of R. S. 102. The indictment (R. 214-215) charged that, having been summoned as a witness to give testimony before the House Committee on Un-American Activities, he appeared but refused to be sworn to testify and thereby willfully defaulted.

Petitioner filed an affidavit of bias and prejudice to disqualify Associate Justice Holtzoff of the District Court of the United States for the District of Columbia, which in substance, asserted that (1) prior to his appointment to the bench, Judge Holtzoff had been legal advisor to the F.B.I. and had participated in investigations of aliens and Communists, which necessarily included petitioner (an alien Communist); (2) in connection with his previous duties, Judge Holtzoff had sponsored anti-Communist legislation; (3) he had publicly expressed admiration and close friendship for the Director of the Federal Bureau of Investigation, who "is and has been violently anti-Communist"; and (4) in 1940, Judge Holtzoff had defended the

propriety of a compilation of information concerning Communists. The affidavit recited that on or about May 20, 1947, immediately upon learning that Judge Holtzoff would preside at the trial, petitioner had communicated his disapproval to counsel but that a conference with co-counsel on the matter was delayed until May 27 because of bereavement of one of his counsel over the death of a brother. The affidavit was executed May 28 and was filed May 29. (R. 222-226.) On June 4, 1947, Judge Holtzoff struck the affidavit as insufficient on its face and untimely (R. 4-6). The trial began before a jury on June 4, and the following evidence was adduced:

At all pertinent times, the Committee on Un-American Activities was functioning pursuant to the House Resolution which established the Committee, delineated the scope of its activities and defined its powers. The Committee was empowered to administer oaths to witnesses (R. 13) and it was the practice at Committee hearings for all witnesses to be sworn, as the "first step" in giving their testimony (R. 48).

On January 23, 1947, the Committee issued a subpoena directing petitioner to appear on February 6 before the Committee, "there to testify touching matters of inquiry committed to said Committee" (R. 22-23). The subpoena was served January 24, 1947 (R. 22). On February 4, petitioner was taken into custody as an enemy alien by Security

Officers of the Immigration and Naturalization Service, acting pursuant to executive order. While in such custody, he was brought to the Committee's hearing room on February 6 (R. 30), and the following colloquy then took place (R. 234-235; cf R. 43-47):

The Chairman.[2] Now, Mr. Stripling, call your first witness.

Mr. Stripling. Mr. Gerhart Eisler, take the stand.

Mr. Eisler. I am not going to take the stand.

Mr. Stripling. Do you have counsel with you?

Mr. Eisler. Yes.

Mr. Stripling. I suggest that the witness be permitted counsel.

Mr. Chairman. Mr. Eisler, will you raise your right hand?

Mr. Eisler. No. Before I take the oath—

Mr. Stripling. Mr. Chairman—

Mr. Eisler. I have the floor now.

Mr. Stripling. I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.

Mr. Chairman. Sit down, Mr. Eisler. Now, Mr. Eisler, you will be sworn in. Raise your right hand.

Mr. Eisler. No.

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[2] The Chairman of the Committee was Representative J. Parnell Thomas (R. 13-14), Mr. Stripling was the Committee's Chief Investigator (R. 26), and Messrs. Mundt and Rankin were members of the Committee.

The Chairman. Mr. Eisler, in the first place, your want to remember that you are a guest of this Nation.

Mr. Eisler. I am not treated as a guest.

The Chairman. This committee—

Mr. Eisler. I am a political prisoner in the United States.

The Chairman. Just a minute. Will you please be sworn in?

Mr. Eisler. You will not swear me in before you hear a few remarks.

The Chairman. No; there will be no remarks.

Mr. Eisler. Then there will be no hearing with me.

The Chairman. You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. Eisler. I am ready to answer all questions, to tell my side.

The Chairman. That is not the question. Do you refuse to be sworn in? All Right.

Mr. Eisler. I am ready to answer all questions.

The Chairman. Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the committee?

Mr. Stripling. Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.

Mr. Mundt. Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

Mr. Rankin. Not "sworn in," but to be sworn.

The Chairman. Mr. Eisler, do you refuse, again, to be sworn?

Mr. Eisler. I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The Chairman. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the committee. But first you have to be sworn in.

Mr. Eisler. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The Chairman. Then you refuse to be sworn.

Mr. Eisler. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

Mr. Chairman. We will give you those 3 minutes when you are sworn.

Mr. Eisler. I want to speak before I am sworn.

The Chairman then dismissed petitioner (R. 28).

Petitioner testified in his own behalf at the trial that he had not refused to testify before the Committee but had insisted, as a condition precedent to such testimony, that he be permitted "to make a few remarks in connection with my arrest" (R.

130), "because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person" (R. 133).

Petitioner was found guilty and he was sentenced to imprisonment for a term of one year and to pay a fine of $1,000 (R. 229). Upon appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed, one judge dissenting (R. 233-245).

ARGUMENT

1. Petitioner contends (Pet. 15-18) that the refusal of the trial judge to disqualify himself nullified the statutory directive in 28 U. S. C. (1946 ed.) 25. It is well settled, of course, that the facts alleged in an affidavit of bias or prejudice cannot be controverted. *Berger* v. *United States*, 255 U. S. 22. The trial judge recognized this limitation, and his incidental observation that "I have no recollection of ever hearing of the defendant in this case until I saw his name in the newspapers several months ago" was made only after he had disapproved the application on the hypothesis that the facts recited therein were true (R. 3-6). The Court of Appeals likewise properly confined itself to determining whether on its face the affidavit asserted facts which fairly supported the charge that Judge Holtzoff had a bent of mind which might have prevented or impeded impartiality of judgment and whether the application was filed within the time prescribed by the statute. Upon those criteria of

sufficiency, which have been approved by this Court (*Berger* v. *United States*, *supra*; *Ex parte American Steel Barrel Co.*, 230 U. S. 35), the decision rejecting the attempted recusation was affirmed.

In appraising the sufficiency of the allegations of fact which are uncontrovertible, it is necessary to strip the affidavit of argument and innuendo. According to petitioner (Pet. 5), the affidavit recited that Judge Holtzoff had, while he was legal adviser to the F.B.I., participated in an F.B.I. investigation of him. This, we submit, is a misleading paraphrase of the affidavit. The affiant carefully refrained, presumably because such was not the fact, from asserting that any investigation in which Judge Holtzoff participated concerned petitioner personally. The affidavit states merely that Judge Holtzoff "figured in an important capacity" in a general investigation "directed against aliens and communists, which necessarily included myself" (R. 224), and that an alleged investigation of petitioner's activities by the F.B.I. "must have come to Justice Holtzoff's attention during the period while he performed such duties." (R. 222-223.) It is patent that the quoted phrases are argumentative inferences, not assertions of fact. An investigation directed generally against aliens and communists does not necessarily embrace every individual who might fall into those categories; nor does a legal adviser to the F.B.I. necessarily learn of the activities of each individual who is investi-

gated. We are left, therefore, with the basic factual assertion that, as legal adviser to the F.B.I., Judge Holtzoff was an important participant "in advising and aiding and determining the policy, nature, scope and objectives of" an investigation into the activities of aliens and Communists (R. 224). It should be noted also that Judge Holtzoff's participation is not alleged to have extended to reviewing, approving, or acting upon any disclosures or reports resulting from the investigation. The other allegations of fact are concerned with (1) Judge Holtzoff's sponsorship and support of anti-communist legislation before the 77th Congress, 1st session (1941), in his capacity as a government official; (2) his defense in 1940 of the propriety of compiling information concerning communists and others holding unorthodox political views; and (3) his close friendship with and admiration for the Director of the F.B.I., a "violent anti-communist." (R. 222-224.)

Apart from the imputation of bias or belief by association, the affidavit asserts nothing more, in essence, than that Judge Holtzoff, in his official capacity prior to his appointment to the bench, advised the F.B.I. and Congress with respect to measures dealing with communists and aliens. That fact, we submit, is inadequate to support the charge that he held a personal bias or prejudice against petitioner. The word "personal" in the recusation statute is not tautological. As the Court of Appeals correctly stated, "impersonal prejudice

resulting from a judge's background or experience is not, in our opinion, within the purview of the statute" (R. 237). *Price* v. *Johnston*, 125 F. 2d 806 (C. C. A. 9), certiorari denied, 316 U. S. 677; *Craven* v. *United States*, 22 F. 2d 605 (C. C. A. 1), certiorari denied, 276 U. S. 627; *Beland* v. *United States*, 117 F. 2d 958 (C. C. A. 5), certiorari denied, 313 U. S. 585.

Moreover, this case is not concerned with whether petitioner was or is a subversive communist or alien. The issue is simply whether he willfully defaulted in refusing to be sworn and to testify before a legislative committee. Absence of bias and prejudice, whether considered in relation to the subject matter or to the defendant, does not mean the total absence of preconceptions in the mind of a judge concerning the nature, objectives, and treatment of communism and communists, as gathered from his background and associations. As this Court observed in rejecting a similar attack upon the impartiality of an administrative official (*United States* v. *Morgan*, 313 U. S. 409, 421):

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

And only at the last Term this Court decided that members of a regulatory commission were not disqualified from determining a cause by reason of having formed a generalized opinion in the field. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 700-701.[3] No less must it be assumed that, upon assumption of judicial duties, a

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[3] "Marquette introduced numerous exhibits intended to support its charges. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, as required by § 6 of the Trade Commission Act. 15 U. S. C. § 46. These reports, as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court's holding that this belief did not disqualify the Commission.

"In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities."

government executive officer or legislator is capable of administering even-handed justice uninhibited by influences of governmental policy in which he formerly participated.

It is the duty of a trial judge not to permit the use of an affidavit of bias and prejudice as a means of accomplishing delay and otherwise embarrassing the administration of justice. *Ex parte American Steel Barrel Co.*, 230 U. S. 35. The statute requires such an affidavit to be filed "not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time." In view of the practice in the District Court for the District of Columbia of sitting in continuous session, except in the summer, with the several judges serving in rotation or upon assignment, the alternative test of "due diligence" is applied there (see R. 242). The application by petitioner to disqualify the trial judge was not made until after the judge had denied motions for dismissal of the indictment and for a bill of particulars and had granted two continuances of the trial date. At least nine days had passed from the time the actual designation of Judge Holtzoff as the trial judge became known to petitioner (R. 225), three days had elapsed since the date originally set for the trial, and only six days remained before commencement of the trial. (R. 231.) In these circumstances, the trial court and the Court of Appeals cannot be said to have abused their dis-

cretion in determining that the application had not been filed with the requisite degree of diligence and hence was not timely.

2. The trial judge is accused of having displayed active hostility and prejudice toward petitioner and his counsel throughout the trial by his rulings, by assuming the role of prosecutor, by one-sided questioning of witnesses, and by harrassing counsel (Pet. 18). The record does not support this accusation. To the contrary, it appears that the trial was conducted in a judicious and orderly manner, and that the judge consistently and impartially attempted to confine the trial to the pertinent issues. His intervention in the examination of witnesses did not extend beyond the scope of his duty to elicit the truth and to clarify the case for the benefit of the jurors. See *Glasser* v. *United States*, 315 U. S. 60, 82; *Griffin* v. *United States*, 164 F. 2d 908 (App. D. C.), certiorari denied, 333 U. S. 857; *Simon* v. *United States*, 123 F. 2d 80 (C. C. A. 4), certiorari denied, 314 U. S. 694.

If the trial judge construed the issues too narrowly to the prejudice of petitioner, his rulings were, of course, subject to correction upon appeal. His attempt to confine the evidence to the issues as he construed and understood them is not, however, a demonstration of prejudice and hostility. Impartiality does not demand that the rulings in favor of one side shall be arithmetically equal to rulings for the other. As the Court of Appeals

concluded after a careful examination of the record, petitioner "persistently attempted to adduce immaterial and irrelevant evidence, and the fact that a great number of rulings adverse to appellant were naturally elicited from the trial court contributes nothing to an assertion of hostility and bias" (R. 240).

Only an insignificant portion of the trial was devoted to the questioning of witnesses by the court. Indeed, the few questions upon which petitioner relies as showing that the judge "assumed the role of the prosecutor and conducted a hostile cross-examination" (Pet. 8, referring to R. 131, 132, 143, 145, 146) demonstrate, to the contrary, that the judge properly exercised his discretion in supplementing efforts of counsel in order to clarify the evidence for the benefit of the jury.

The complaint that the trial judge "continuously reprimanded and harassed defense counsel" (Pet. 6) is no more worthy. Not only is there no showing that petitioner was thereby prevented from introducing all the evidence that was properly available to him, but an examination of the record reveals that such rebukes and admonitions as were administered were couched in temperate and reserved language. It is, of course, impossible fully to glean from the printed word the tone or demeanor of either counsel or court, but the record does not disclose the existence of any such spirited controversy between them as might have intimi-

dated counsel or given to the jury the impression of advocacy on the part of the judge.

3. Petitioner attacks the constitutional validity of the authorization pursuant to which the Committee on Un-American Activities summoned him to testify. He has correctly noted (Pet. 27) that the identical issue has been twice presented to this Court and that certiorari has been denied in both instances. *Josephson* v. *United States*, 333 U. S. 838, rehearing denied, 333 U. S. 858; *Barsky* v. *United States*, 334 U. S. 843.

Here, as in the *Josephson* case, it is questionable whether petitioner has standing to challenge the constitutionality of the Committee's authority in view of his refusal to submit to any and all interrogation except on conditions which, as we shall show (*infra*, pp. 21-24), he had no right to impose. In our brief in opposition in the *Josephson* case (No. 535, Oct. T. 1947), we pointed out (pp. 7-8) that Josephson, like petitioner here, had chosen to attack the legality of the Committee's enabling resolution before any of his rights were infringed or threatened by the Committee, and, therefore, had no standing to raise the constitutional issue.

Assuming, however, that petitioner is in a position to raise the question, he urges that the issue of the constitutionality of the Committee's authority is one of extreme public importance which "requires the consideration of this Court" (Pet. 28). On that question, we deem it unnecessary to

attempt to add to what has already been said in the opinions of the Courts of Appeals for the Second Circuit and the District of Columbia in the *Josephson* (165 F. 2d 82) and *Barsky* (167 F. 2d 241) cases and in our brief in opposition in the *Josephson* case.

4. The subpoena served upon petitioner called upon him to appear and testify "touching matters of inquiry committed to said Committee" (R. 23). The Committee was functioning throughout as a standing Committee of the House of Representatives pursuant to and in accordance with the resolution creating it (R. 13). The enabling resolution (*supra*, pp. 5-6) discloses the nature and scope of the inquiry and, in conjunction with the subpoena, disposes of petitioner's contention (Pet. 20-22) that the Government failed to prove that he was summoned to testify in a matter under inquiry before the Committee. Moreover, in view of the petitioner's refusal to submit to questioning, he cannot now complain that the prosecution failed to adduce evidence showing the specific questions which were contemplated by the Committee or to prove their pertinence to the inquiry. *McGrain* v. *Daugherty*, 273 U. S. 135, 160; *Josephson* v. *United States*, 165 F. 2d at 86-87. Nor is the alleged ulterior motive of the Committee in summoning this witness material. Suffice it to say that, since the subpoena on its face was issued pursuant to the Committee's authority, the motives of the Committee members

are not matters for judicial cognizance. *Josephson v. United States, supra*, 165 F. 2d at 89.

5. Petitioner urges error in the exclusion of evidence with respect to the remarks which he intended to make to the Committee before he would consent to be sworn. The fact of the matter is, however, that evidence on this subject was admitted (R. 112, 130, 131, 133, 135, 138, 140; cf. R. 77, 159-160). For example, petitioner's wife testified that he had "prepared a small statement, or a few remarks, if you want to, which he wanted to make to protest his illegal arrest * * * instigated by the Un-American Activities Committee" (R. 112). Petitioner, in response to the question by his counsel "And what did you want to say?" testified, "Before I took the oath, I wanted to make a few remarks in connection with my arrest" (R. 130); and, again, in response to a question as to why he wished to make some remarks before he would be sworn, petitioner stated: "Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person" (R. 133). It is true that the trial court confined testimony concerning the proffered statement to a characterization or a summarization of its content and excluded evidence of the details. Detailed evidence in elaboration of petitioner's intended attack upon the Committee would have served merely to confuse the issue before the jury.

The admissibility of this evidence depended upon (1) its relevancy and materiality on the question whether a "default" occurred within the meaning of Section 102 of the Revised Statutes, and (2) its probative value on the question whether the default was "willful." We believe that petitioner's reasons for refusing to testify before the Committee have no bearing on the first question. The Committee, not the witness, determines its procedure. Conceding that such evidence may be admissible on the question of willfulness (although its probative value is slight since, as we shall show, a bad purpose is not required), petitioner's rights in having the jury consider the evidence were fully protected (*infra*, pp. 24-25).

The trial court properly refused petitioner's request to charge that he should be acquitted if he intended only to make a legal objection to the Committee's procedure and was otherwise willing to be sworn and to testify (Pet. 22). In effect, petitioner is contending that no default occurs unless and until a legislative committee grants the demand of a witness that he be allowed to make a statement of legal objections prior to taking the oath and testifying. But the exercise of judgment as to the manner of exercising its inquisitorial power, within constitutional limits, is entrusted to the Committee, not the witness. *Barry* v. *United States*, 279 U. S. 597; *Townsend* v. *United States*, 95 F. 2d 352 (App. D. C.), certiorari denied, 303

U. S. 664. The Committee explicitly made known its mode of procedure to the petitioner (R. 43-47).

It is specious to argue that "default" does not include a refusal to be sworn (Pet. 23). The petitioner was summoned to "testify, etc." The word "testify" imports an oath or affirmation, which is the customary preliminary qualification to giving testimony. "It was decided very early by both House of Congress, that the power to compel information ought not to be used without the solemnity of an oath to the fact." Eberling, *Congressional Investigations*, p. 298. The oath is the customary first step in the reception of testimony by the Committee on Un-American Activities (R. 13-14). In principle, petitioner's refusal to accept this procedure was as much a frustration of his appearance as if he had walked out, without excuse, before the Committee's questions were fully answered. Cf. *Townsend* v. *United States*, *supra*. Petitioner did not object to taking an oath as such; indeed, he expressed his willingness to take an oath, with the proviso, however, that the Committee would accede to the conditions which he sought to impose.

No question of due process is presented. The Committee has discretion to determine how best to conduct its business with efficient dispatch. Petitioner was advised that an opportunity to make a statement would be afforded after he had testified but he refused to abide by that procedure (R. 47).

It is the prerogative of the Committee to determine the time and manner of such presentations lest the hearing be perverted by declarations having little relevance to the issue at hand. It has been well established since 1795 that Congressional Committees are not bound to follow principles or precedents of courts of law. Dimock, *Congressional Investigating Committees*, p. 153; cf. *People ex rel. Keeler* v. *McDonald*, 99 N. Y. 463.

6. The trial court charged the jury that the term "willfully," as used in Section 102 of the Revised Statutes, means a deliberate and intentional default, as distinguished from mere inadvertence or accident, and not necessarily that a default must be motivated by an evil or bad purpose; that the motivation is immaterial so long as the default was deliberate and intentional (R. 172). This instruction is identical with that which was approved in *Fields* v. *United States*, 164 F. 2d 97, 100 (App. D. C.), certiorari denied, 332 U. S. 851, which involved a similar default before a congressional committee. The majority and dissenting judges in the Court of Appeals agreed that the trial court's construction of the term "willful," in the context of this statute, was correct. Cf. *Sinclair* v. *United States*, 279 U. S. 263, 299.

The evidence of intentional and deliberate refusal to testify was so compelling that we fail to see how the jury could have failed to find the requisite "willfulness." In their deliberations they had be-

fore them petitioner's version of the reasons for his refusal to be sworn and testify (see p. 21, *supra*). Indeed, the trial court supplemented his charge to emphasize petitioner's contention in this respect, repeating *verbatim* petitioner's own words, "because I had objection against the whole, what I considered unlawful proceedings of this committee against my person" (R. 177). Presumably, the jury gave this evidence the weight to which it was entitled. Moreover, the jury may have inferred that petitioner in fact intended, in the 3-minute period which he requested, to start reading the 20-page mimeographed statement. It contained the revealing preface: "In order to save your time when it comes to questioning, I shall tell you what I am going not to answer" (R. 148). Contumacy could hardly be more patent.

7. Petitioner came to this country in June 1941 on a transit visa (R. 114). In February 1947, about ten days after the Committee's subpoena was served upon him (R. 22), he was arrested by immigration officials under an executive warrant. The contention is now advanced (Pet. 25-26) that as an alien enemy in transit, detained in this country against his will, he could not be required to appear and testify before a Congressional committee.

The statute punishing a willful default applies without distinction to "every person" (*supra*, p. 4). The obligation to furnish legislative committees with such information and data as they are

constitutionally empowered to elicit is not peculiar to citizenship, and, therefore, petitioner was no less amenable than a citizen to obey the statute. Cf. *Carlisle* v. *United States*, 16 Wall. 147. Alien enemies, even those interned, have access to our courts. *Ex parte Kawato*, 317 U. S. 69, 73. They are entitled to the constitutional guaranties of the Bill of Rights in criminal proceedings even in time of war. *Von Moltke* v. *Gillies*, 332 U. S. 708. Other privileges and opportunities were afforded petitioner during his sojourn in this country. Correlatively, alien enemies cannot hold themselves above process in private or public litigation. Oppenheim's *International Law* (Rev. 6th ed. Lauterpacht), p. 253. We are referred to no authority in international law that affords petitioner an immunity from process of our Congress.

The argument that as an interned alien enemy, petitioner was a "prisoner of war" and, therefore, entitled under Article 5 of the Geneva Convention to refuse to answer any questions other than name, rank, and regimental number, is defective on several grounds, each independent of the other. First, there is no showing that petitioner was "interned" as an alien enemy. Second, the term "prisoner of war" in the context of the Geneva Convention, 47 Stat. 2021, is not applicable to petitioner who, far from being within the class of captured military personnel or those similarly situated for whom the protection of the Convention was contemplated (Dig. Op. J. A. G. (1912-1940) par. 2180a), was a

civilian at liberty in this country throughout the period of hostilities. Finally, Article 5 of the Geneva Convention forbids coercion of prisoners to secure "information relative to the condition of their army or country." The protection afforded by Article 5 is obviously not germane to the inquiry for which petitioner was summoned.

The fact that petitioner was under arrest and in the custody of immigration officials at the time he appeared before the committee is without significance. As the Court of Appeals observed, that fact "did not mitigate his obligation to give testimony; the arrest, if actually unlawful as appellant contended, was a matter to be contested by appellant in a judicial proceeding if he so desired, and was irrelevant to the proceedings before the Committee" (R. 237).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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